

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Submitted On Briefs March 26, 2009 Session

RHONDA DEAN WILSON v. MICHAEL WAYNE WILSON

**Direct Appeal from the Circuit Court for Sumner County
No. 31175-C C. L. Rogers, Judge**

No. M2008-02073-COA-R3-CV - Filed April 17, 2009

This appeal arises from a divorce action. The trial court awarded Wife *alimony in futuro* but it denied Wife attorney fees. Wife appeals, taking issue with the trial court's calculation of Husband's monthly expenses and its determination that Husband is unable to pay her attorney fees. We vacate and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and J. STEVEN STAFFORD, J., joined.

Russell E. Edwards, Hendersonville, Tennessee, for the appellant, Rhonda Dean Wilson.

Robert G. Ingram, Gallatin, Tennessee, for the appellee, Michael Wayne Wilson.

OPINION

Background/Procedural History

The facts in this case are largely undisputed. The parties to this divorce action, Rhonda Dean Wilson ("Ms. Wilson" or "Wife") and Michael Wayne Wilson ("Mr. Wilson" or "Husband"), were married for approximately eighteen years. At the time of trial, Ms. Wilson was 42 years of age and Mr. Wilson was 46 years of age. The parties have two minor children. The parties' youngest son is autistic. Although the youngest child attends special education classes at school and participates academically in several subjects, his ability to support himself in the future is uncertain.

The parties have disparate incomes and earning capacities. Based on Ms. Wilson's need to stay home to care for the youngest child¹ and her own physical disability,² the trial court found that Ms. Wilson had no income. Before her injury, Ms. Wilson worked full time as a nail technician, earning at most \$20,000.00 per year. In the past, Ms. Wilson has also worked as a bank teller and as a dental assistant. Mr. Wilson, on the other hand, currently earns \$98,000.00 per year. He also has a 401(k) and a pension plan, although he cannot draw a pension until he reaches age 65.

Despite Husband's income, the Wilsons' marriage has been replete with financial difficulties. The trial court observed that the parties simply "don't have enough money to go around." The parties agree that they have a history of financial problems; they filed for bankruptcy four years ago, and have, admittedly, lived beyond their means since then. The marital home was encumbered with two mortgages that together exceeded the estimated value of the property.³ The parties admit that they had no savings accounts and have essentially been living paycheck to paycheck. The Wilsons own two cars; Mr. Wilson drives a Chevrolet Silverado, which they purchased in October 2006 for \$19,000.00, and Ms. Wilson drives a Chevrolet Tahoe, which they purchased in January 2007. Mr. Wilson testified that they still owed approximately \$16,000.00 to \$17,000.00 on the Silverado and \$27,000.00 to \$28,000.00 on the Tahoe.

Prior to trial, the parties stipulated that there were grounds for divorce and divided most of their personal property among themselves. They agreed that Mr. Wilson would retain his 401(k) plan. They also agreed that Mr. Wilson would retain the Chevrolet Silverado and would be solely responsible for payment of its debt. Finally, Mr. and Mrs. Wilson assented to sell the house and that any net proceeds or debts from the sale would be equally divided between the parties. However, Ms. Wilson filed a motion asking this Court to consider post-judgment facts that the house was sold at foreclosure. No response was filed to the motion. This Court granted the motion to consider as post-judgment facts that the marital home was sold at a foreclosure sale and the parties were not entitled to any of the proceeds.

The trial court entered a Final Decree of Divorce that divided the remainder of the Wilsons' marital property. Pending sale of the marital home, the trial court permitted Ms. Wilson and the children to reside there, while Mr. Wilson remained responsible for the monthly mortgage and utility

¹Mr. Wilson admitted that Ms. Wilson was needed at home to care for their youngest son.

² In March 2007, Ms. Wilson sustained nerve damage in her leg. The injury, combined with the medication prescribed, interferes with her ability to work. Ms. Wilson has filed for Social Security disability but the final status of her claim is unclear.

³Husband alleged that the 2008 county tax appraisal for the marital home was \$184,100.00. He also asserts that the outstanding debt on the first mortgage was \$167,912.82, and the outstanding debt on the second mortgage was \$46,637.49.

payments.⁴ Due to the youngest child's disability, the trial court ordered Mr. Wilson to continue paying child support beyond the child's eighteenth birthday. The court found that the portion of Mr. Wilson's pension that accrued during the marriage was marital property that should be equally divided between the two parties.⁵ The court awarded the Chevrolet Tahoe to Ms. Wilson and held Ms. Wilson responsible for payment of the vehicle's debt.

The trial court also found that because of her physical disability and her responsibility to stay home and care for the parties' disabled child, Ms. Wilson had no current income. The trial court therefore ordered Mr. Wilson to pay Ms. Wilson \$1,000.00 a month as alimony *in futuro* beginning July 2008. These alimony payments were to continue until either party died or Wife remarried. Any disability payments, however, that Ms. Wilson would receive in the future would reduce the amount of alimony. Finding that Ms. Wilson could pay for her health insurance out of her spousal support, the trial court did not require Mr. Wilson to pay Wife's insurance. The trial court held each party responsible for his or her own attorney fees and divided the costs equally between the parties.

After the trial court entered the Final Decree of Divorce, Wife filed a Motion to Alter or Amend seeking, among other things, that the court award Wife attorney fees. Ms. Wilson's attorney submitted an affidavit that the total amount of attorney fees that Wife incurred in the trial court was \$9,518.25. The trial court denied Ms. Wilson's Motion to Alter or Amend on the grounds that it found that Husband was unable to pay Wife's attorney fees. Ms. Wilson filed a timely notice of appeal to this Court.

Issues

As stated in her brief, Ms. Wilson raises the following two issues on appeal:

- (1) Whether the Trial Court erred in not awarding the Wife her attorney's fees incurred at the trial level.
- (2) Whether the Wife should be awarded her attorney's fees incurred on appeal.

Mr. Wilson raises only the following issue for our review:

Whether the Husband should be awarded his attorney's fees incurred on appeal?

⁴ At the time of trial, Mr. Wilson was living with his parents, so he was not yet paying rent or rental utilities. He testified, however, that after the divorce was finalized he intended to rent a house.

⁵ The Court ordered the parties to return to court once Husband begins drawing from his pension so that it could determine Wife's share of the pension payments.

Standard of Review

This case primarily involves a dispute over the trial court's failure to award Wife alimony *in solido* for attorney fees. Because an award of attorney fees lies in the discretion of the trial court, we will not reverse absent an abuse of that discretion. *Owens v. Owens*, 241 S.W.3d 478, 495 (Tenn. Ct. App. 2007.) A trial court abuses its discretion when the evidence does not support the court's decision, when the court applies an incorrect legal standard, or when it reaches a decision that contravenes logic or employs reasoning that causes an injustice to the complaining party. *Id.* at 496.

Attorney Fees Incurred During Divorce Proceedings

We first address Ms. Wilson's assertion that the trial court should have awarded her the attorney fees that she incurred before the trial court. Although civil litigants are generally responsible for paying their own fees, a court may appropriately award attorney fees to an economically disadvantaged spouse in a domestic relations case. *Id.* at 495. An award of attorney fees to an economically disadvantaged spouse is characterized as alimony *in solido*. *Id.* at 495. As with any alimony award, the trial court must balance the various factors enumerated in Tennessee Code Annotated § 36-5-121(I).⁶ *Id.* at 495. The most important factors to consider, however, are the need of the economically disadvantaged spouse and the ability of the obligor spouse to pay. *Id.* at 495. The type and amount of an alimony award is within the discretion of the trial court. *Riggs v. Riggs*, 250 S.W.3d 453, 456–57 (Tenn. Ct. App. 2007).

⁶ The following are the factors listed in Tennessee Code Annotated § 36-5-121(I):

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

The trial court denied Ms. Wilson's request for attorney fees because it found that Mr. Wilson was unable to pay these fees. Neither party denies that Wife is economically disadvantaged compared to Husband. The parties' main dispute is whether Mr. Wilson is able to pay Wife's attorney fees. Ms. Wilson asserts that Mr. Wilson has sufficient resources with which to pay her attorney fees. To support this contention, Ms. Wilson claims that Mr. Wilson's income exceeds his expenses by \$1,072.59 per month.⁷ Husband, however, asserts that he is not financially able to pay Wife's attorney fees. The trial court found that after the sale of the house Mr. Wilson's monthly expenses, including his child support payment, totaled \$5,200.00 per month.⁸ In addition, the court ordered Mr. Wilson to pay Ms. Wilson \$1,000.00 a month in alimony. Because his monthly net income is \$6,164.25, Mr. Wilson argues that after he pays his living expenses, child support obligation, and spousal support obligation, he has no money left with which to pay Ms. Wilson's attorney fees. For the following reasons, we find that the trial court erred.

We cannot agree with Mr. Wilson's argument that his monthly bills, alimony payments, and child support obligations leave him entirely unable to pay any amount of Wife's attorney fees. The trial court relied on Mr. Wilson's affidavit of income and expenses to estimate what Mr. Wilson's expenses would be after he sold the marital home. It is quite clear from review of the record that the trial court expressly excluded the following from its calculation of Husband's expenses: the

⁷ Ms. Wilson's calculation erroneously lists Mr. Wilson's auto insurance as \$87.00 rather than \$187.00. Her calculation also failed to include Mr. Wilson's \$369.00 monthly car payment.

⁸ Husband submitted the following monthly expenses to the trial court:

Mortgage on marital residence	\$1515.97
Real estate taxes	\$125.00
Homeowner's insurance	\$72.08
Electricity	\$269.00
Water	\$75.00
Sewer	\$95.00
Husband's rent (2 bedroom apartment)	\$1000.00
Husband's rental utilities (electricity, water, sewer)	\$300.00
Telephone/Cell	\$240.00
Food	\$300.00
Clothing	\$60.00
Child Support	\$1337.00
Life Insurance	\$131.00
Installment Payments (auto x2)	\$1000.00
Auto Insurance	\$187.00
Transportation (not including auto payments but including gas and maintenance)	\$250.00
Recreation and entertainment	\$75.00
Miscellaneous (children expenses, gas, etc.)	\$30.00
Church	\$60.00
Charitable Contributions (United Way-thru payroll)	\$21.66
Union Dues	\$71.00

mortgage on the marital residence, real estate taxes on the marital residence, homeowner's insurance, \$100.00 from Husband's estimated utility expenses, and \$631.00 monthly payment for Wife's car. Subtracting these expenses from those listed in Husband's affidavit, however, we are unable to discern from the record how the trial court found that Mr. Wilson's monthly expenses totaled \$5,200.00.⁹ Accordingly, we find that the evidence fails to support the trial court's determination that Mr. Wilson's monthly expenses total \$5200.00.

We believe that the trial court also erred by crediting Mr. Wilson with various monthly expenses which he does not actually incur. The trial court estimated what Mr. Wilson's expenses would be both before and after the sale of the marital home. The trial court included \$339.00 in electrical, water, and sewer costs for the marital home in calculating Mr. Wilson's monthly expenses *after* the sale of the marital home.¹⁰ We have determined that the evidence does not support this decision. The trial court also included \$240.00 for "Telephone/Cell" charges as part of Mr. Wilson's total monthly expenses. In April 2008, the trial court entered an order permitting Mr. Wilson to cancel the family's cell phone plan. Mr. Wilson admitted at trial that he had terminated the cell phone contract and was not paying \$240.00 a month in cell phone expenses. Accordingly, we find that the evidence fails to support the trial court's determination that Mr. Wilson continues to incur \$240.00 in monthly telephone expenses. We find that the trial court erred in calculating Mr. Wilson's monthly expenses. The trial court also erred, therefore, by finding that Mr. Wilson's monthly expenses are so great that he is completely incapable of paying any portion of Wife's attorney fees. We, therefore, vacate the trial court's order denying Wife her attorney fees and remand this case to the trial court to recalculate Husband's monthly expenses and reconsider what amount of attorney fees, if any, that Mr. Wilson has the ability to pay.

Attorney Fees Incurred on Appeal

On appeal, both parties request that we award them their respective attorney fees. Husband argues that Wife's appeal is frivolous. It is within this Court's sole discretion to award attorney fees on appeal. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995.) Exercising our discretion and considering all of the circumstances in this case, we deny both parties' request for attorney fees in this appeal.

⁹Following the court's reasoning, we only calculate Husband's expenses monthly expenses to be \$4,770.66.

¹⁰The electricity, water, and sewer expenses totaled \$339.00. At trial, Mr. Wilson testified that after the parties sold the marital home he intended to rent a house. He estimated his total utility expenses for the rental home to be \$300.00. The utility costs for Mr. Wilson's rental home are listed separately in his affidavit of income and expenses and the trial court also included this expense in determining Mr. Wilson's ability to pay.

Conclusion

For the foregoing reasons, we vacate the judgment of the trial court. Costs of this appeal are taxed to the Appellee, Michael Wayne Wilson.

DAVID R. FARMER, JUDGE